No. 93-1157

FEB 2 2 1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

VINCENT SERENO,

Petitioner,

v.

EDUARDO PACUMIO, et al.,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

Whether Petitioner's assertion of a conflict among the Circuits with respect to enforcement of FRCP Rule 51 is nothing more than a frivolous and meritless effort on the part of the Petitioner to inappropriately avoid his responsibility for the judgment below.

Whether Petioner, a state officer, who the jury found to have violated the 1st Amendment rights of Respondent-Plaintiff Jaime Nievera, can obtain relief from a special jury verdict on that constitutional violation after trial when Petitioner never preserved an objection to the instructions or special verdict and waived his right to a jury trial on all issues relevant to the 1st Amendment claim pursuant to FRCP Rule 49(a).

Whether Petitioner, who agreed to try a case as a 1st Amendment civil rights

case, agreed upon the jury instructions and the special verdict form without objection and then lost, can obtain relief from the jury verdict and the requirements of FRCP Rule 51 by simply recasting the case as a state malicious prosecution case and asserting a failure on the part of the District Court to instruct on the newly asserted malicious prosecution claim before the Ninth Circuit; and by now asserting a failure to instruct on the 1st Amendment claim in this Court.

LIST OF PARTIES
TO THE PROCEEDING
IN THE U.S. COURT OF APPEALS

VINCENT SERENO,

Appellant,

JAIME NIEVERA,

Appellee,

EDUARDO PACUMIO; NENITA PACUMIO; PATRICK and ROY PACUMIO, Minors, by their Guardian Ad Litem, Eduardo Pacumio; DANILO EVANGELISTA; JISELA EVANGELISTA; JAY and JASON EVANGELISTA, Minors, by their Guardian Ad Litem, Danilo Evangelista; FELICITO TORRES; SALUSTIA TORRES; LESTER and MERILEE TORRES, Minors, by their Guardian Ad Litem, Felicito Torres; JAIME NIEVERA; TITA NIEVERA; TERRELL and JAIMELENE NIEVERA, Minors, by their Guardian Ad Litem, Jaime Nievera; FELICITO NER; ANGELITA NER; JUSTIN NER, A Minor, by his Guardian Ad Litem, Felicito Ner; AUGUSTO GABRIEL, JR.; PRISCILA GABRIEL; ALEXANDER and LOUIE GABRIEL, Minors, by their Guardian Ad Litem, Augusto Gabriel, Jr.; ANTONIO PILAPIL; and VIRGINIA PILAPIL,

Cross-Appellants,

VINCENT SERENO; REID SELOVER; ED LEE; ROGER HOGAN; JOEL BIBBY; and FRED PAIGE,

Cross-Appellees.

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BRIEF IN OPPOSITION

Jaime Nievera, the Respondent herein, hereby opposes the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in *Pacumio v.*

Sereno, No. 92-15290, issued on October 5, 1993.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The First Amendment to the United States Constitution is set out in the Appendix [Res. App. B, at 17a, *infra*].

Rule 49(a) of the Federal Rules of Civil Procedure also is set out in the Appendix [Res. App. B, at 17a, *infra*].

STATEMENT OF THE CASE

This is a frivolous and meritless Petition for Writ of Certiorari. There are neither special nor important reasons to grant this Petition for Writ of Certiorari. The Ninth Circuit has not rendered a decision that is in conflict with the other circuits with respect to FRCP, Rule 51. In any event, Petitioner has utterly failed to preserve any objection to the challenged instructions not only pursuant to FRCP,

Rule 51, but also pursuant to FRCP, Rule 49(a).

At the trial below, the jury returned a special verdict on behalf of Respondent Jaime Nievera that Petitioner Park Ranger Sereno violated his 1st Amendment rights, to wit, "by wrongfully retaliating against him for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera...." [Special Jury Verdict, Res. App. A, pp. 13a-16a; ER 134-35]. In short, after protesting the eviction of himself along with twenty-four other Filipino family members and friends, [1]

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1 Mr. Nievera's family and friends are law abiding citizens who were candidly filmed on videotape on the afternoon of July 15, 1989 [Respondent's Trial Exhibit #1 - SER 295]. The District Court in its ruling on

Mr. Nievera was forced to defend a false and meritless criminal allegation of assault by Sereno. As a result of this constitutional violation, the jury awarded Mr. Nievera $4,500 in damages, including $3,500 for attorney fees to defend the criminal prosecution, and $1,000 for loss

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Count 1 at the trial below underscored this in two significant findings: 1) "The evidence has well established that the plaintiffs are law-abiding and good citizens of the United States, none of them ever having had any prior adverse experience with the law, criminal or civil." [SER 318:14-18]; 2) "A videotape in evidence shows activities of the plaintiff[s] that did not appear to involve excessive noise, did not appear to involve any types of unlawful behavior and did not involve any violations of the criminal law of the state or of the park regulations." [SER 319:15-20] There was also substantial evidence that Plaintiffs below are productive citizens holding positions of public service and those, who happen to be children, are aspiring to responsible careers. [RT: 743-746, 837-838, 257-258, 242-244, 940-942, 963-965, 284-285, 300-302, 165-166, 60-63, 312-313, 327-329, 1016-1020, 1092-1094, 340-341, 355-357, 1148-1149, 1209-1212, 367-368, 898-901. 915-917, 1204, 386-388, 708-710, and 630-631]

wages and emotional distress damages. [Res. App. A, p. 15a; RT: 1045]

Significantly, prior to the jury being instructed and retiring, there was an extended jury instruction and special verdicts conference with counsel for the parties and the District Court that lasted for no less than seven and a quarter hours and occurred over two days. [RT:1574:17-23] The initial proposal for special verdicts was made by and drafted by the defendants. [RT:1582:14-1583:3] Additionally, the trial judge at least twice invited counsel for Mr. Sereno for comments either to the jury instructions or the special verdicts. However, the Petitioner's counsel made no objection to either the jury instructions or the special verdicts with respect to the 1st Amendment claim. [RT: 1578:1-1582:4] Petitioner acknowledges on the face of the petition

his failure to preserve any objection to the relevant instructions and jury verdicts. [Pet. pp. i and 7] On the record there was no preservation of any challenge to the instructions or special verdicts pursuant to either FRCP, Rule 51 or FRCP, Rule 49(a).

After trial, Petitioner moved for judgment notwithstanding the verdict or new trial asserting, *inter alia*, his own first amendment right of free speech. However, consistent with the verdict, the District Court found that there is no First Amendment privilege for knowingly false speech; that Sereno sought the criminal complaint against Mr. Nievera [RT 134:23-24]; and that Sereno's request for the criminal complaint was the legal cause of Mr. Nievera having to travel to a remote and distant Mariposa County far from his home in the Bay Area to defend a meritless

criminal case, incurring legal defense fees and losing wages; and that Sereno's conduct was a concurrent cause of the prosecution in no way absolves him of liability for such vengeful conduct. [Pet. App. C, pp. 33a-35a] These findings as well as the jury verdict were supported by substantial evidence. [Pet. App. C, p.36a]

Petitioner misrepresented the nature of the case before the Ninth Circuit in hopes of obtaining relief from the jury verdict below by recasting the case as a malicious prosecution case. However, there was no state malicious prosecution claim in the complaint [Excerpts of Record "ER" 1-14]. Nor was such a claim tried during the course of the proceedings below as underscored by the District Court's Pre-Trial Order [Supplemental Excerpts of Record "SER" 256-280] which does not list malicious prosecution as an issue for

trial. Similarly, there was no jury verdict identifying a malicious prosecution claim for the jury to decide. [ER 125-136] On the contrary, the language that Petitioner attempted to persuade the Ninth Circuit into believing was a malicious prosecution claim was in fact the jury verdict with respect to the 1st Amendment U.S. Constitutional Claim.[2]

The Ninth Circuit agreed with the District Court and Mr. Nievera that his claim was and has always been for unlawful retaliation against the exercise of his first amendment rights. Further, the Ninth Circuit rejected Petitioner's argument that there was insufficient evidence to support the claim and found that there was sufficient evidence for the jury to

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[2] See Special Jury Verdict for Jaime Nievera's 1st Amendment U.S. Constitutional Claim [Res. App. A, pp.13a-16a; ER 134-135]

conclude that Sereno filed a false report to punish and to retaliate against Nievera for protesting the eviction. [9th Circuit 10-5-93 Memorandum, Pet. App. A, p. 3a]

This Petition is yet another effort to obfuscate what occurred below and to obtain relief from a jury verdict that is solidly based on facts and law. Petitioner now suggests to this Court that there was no instruction with respect to the 1st Amendment §1983 claim; and there was a failure of proof that Sereno's conduct caused the constitutional injury to Mr. Nievera. However, viewing the jury instructions as a whole and the special jury verdict, it is clear that no instructional error occurred and both the special verdict and judgment were supported by substantial evidence. [Res. App. A, pp. 1a-16a]

REASONS FOR DENYING THE WRIT

I

CONTRARY TO THE REPRESENTATION MADE IN THE PETITION, THE NINTH CIRCUIT HAS NOT RENDERED A DECISION THAT IS IN CONFLICT WITH THE OTHER CIRCUITS WITH RESPECT TO THE ENFORCEMENT OF FRCP, RULE 51.

The Ninth Circuit and every other Circuit Court of Appeals apply Rule 51, Federal Rules of Civil Procedure, to bar litigation of objections to jury instructions raised for the first time on appeal. *Hammer v. Gross*, 932 F.2d 842 (9th Cir.1991), *cert. denied, sub nom., City of Newport Beach California v. Hammer*, ___ U.S. ___, 112 S.Ct. 582 (1991). [3] The pertinent part of Rule 51

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3 Even the cases cited by Petitioner to show existence of the exception reveal the universal and longstanding application of Rule 51. *Morris v. Travisono*, 528 F.2d 856 (1st Cir.1976); *MacEdward v. Northern Electric Co., Ltd.*, 595 F.2d 105 (2nd Cir. 1979): *Choy v. Rouchelle*, 436 F.2d 319 (1970); *Furka v. Great Lakes Dredge & Dock Company, Inc.*, 755 F.2d 1085 (4th Cir.1985); *Rodrigue v. Dixilyn Corporation*, 620 F.2d 537 (5th Cir.1980); *Ivey v. Wilson*, 832

provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection."

Rule 51 is a rule of preclusion, which promotes the adjudicative ideals of Rule 1 to attain "the just, speedy, and inexpensive determination of every action." It "was designed to prevent unnecessary new trials caused by errors in instructions that the district court could have corrected if they had been brought to its

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F2d 950 (6th Cir.1987); *Shearson v. Leach*, 583 F.2d 367 (1987); *Beckman v. Mayo Foundation*, 804 F.2d 435 (8th Cir.1986); *Ryder v. The City of Topeka*, 814 F.2d 1412 (10th Cir.1987); *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074 (11th Cir.1987); *Montgomery v. Virginia*, 191 F.2d 770 (D.C.Cir.1951); and *Lummus Industries, Inc. v. D. M.& E Corporation*, 862 F.267 (Fed Cir.1988). [Pet. 10]

attention at the proper time." *Robinson v. Heilman*, 563 F.2d 1304, 1306 (9th Cir.1977) A party who fails to object to the inclusion of an incorrect charge or the omission of a correct one waives the objection and is precluded from litigating the issue on appeal. *Woodbridge v. Dahlberg*, 954 F.2d 1231 (6th Cir.1992)

Rule 51 is a salutary rule of trial and appellate practice, which conforms to general trial and appellate practice. As stated in *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 (1943):

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

FRCP Rule 51, like Rule 30 of the Federal Rules of Criminal Procedure, requires a timely objection to preserve an instructional error but courts are less willing to forgive noncompliance. Appellate courts generally hold that the failure to make a timely objection and distinctly point out the matter to which the objection is directed bars a party from raising the issue on appeal. See cases cited in footnote 3; *Seltzer v. Chesley*, 512 F.2d 1030 (9th Cir. 1975); and *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379 (9th Cir. 1965).

Even in criminal cases, application of the "plain error" doctrine is the exception rather than the rule. "Plain error arises only in **exceptional circumstances** where we find that the trial court's decision affected substantial rights and where it is 'highly probable that the error materially

affected the verdict.'" *United States v. Span*, 970 F.2d 573, (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1283 (1992). [Emphasis added]

In civil cases, the so-called "plain error" doctrine is a judicially created exception to Rule 51. All Circuit Courts of Appeals, including the Ninth Circuit, sparingly apply a variant of the "plain error" doctrine in exceptional circumstances to prevent a miscarriage of justice. In an appropriate case, the "plain error" exception is invoked to "correct the mistake made by court and counsel below." *Rodrigue v. Dixilyn Corporation*, *supra*, at 540.

> "The doctrine is not a routine by-pass to Rule 51, however. The criterion for application of this doctrine is 'certainly not whether [this] court approves or does not disapprove the results of the case.' *Shepard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371

> (5th Cir.1969) Plain error is found, however, if 'the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice.' *Jamison Co., Inc. v. Westvaco Corp.*, 526 F.2d 922,, 933 (5th Cir. 1976)." [footnote omitted]

Rodrigue v. Dixilyn Corporation, supra, at 540.

The Ninth Circuit recognizes and applies variants of the "plain error" doctrine. Even though for reasons which arise from practice and docket problems peculiar to the Ninth Circuit, it is more vocal than other Circuits about its reluctance to apply the "plain error" doctrine. The Ninth Circuit's comments in this case and in *Hammer, supra*, that, "There is no plain error exception" are misleading. [Pet. App. 3a] The Ninth Circuit has and does depart from Rule 51 when necessary to prevent a miscarriage of justice.

In four different situations, the Ninth Circuit departs from Rule 51: one, where it is futile to raise the objection in the trial court, *Hammer, supra*, at 847; two, to give effect to an intervening change in the law, *Reed v. Hoy*, 909 F.2d 1421, 1423 (9th Cir. 1990), *rehearing den.*, 909 F.2d 324; three, where the issue is apparent from the way the trial is conducted, *Glover v. BIC Corp.*, 987 F.2d 1410 (9th Cir.1993); and, four, where a party is not allowed a fair opportunity to object, *Stewart v. Ragland*, 934 F.2d 1033, 1042 (9th Cir.1991).

In this case, there are no exceptional circumstances to support application of the "plain error" doctrine on the facts of the record. Yet, Petitioner contends that "plain error" exists because the trial court allegedly did not "charge any of the elements of [Respondent's] retaliation

claim ... " which resulted in a miscarriage of justice." [Pet. 13, 14] Petitioner is wrong. The record shows that the trial court instructed the jury on every essential element of the claim. [ER 65-70; 134-136; Res. App. 1a-16a]

When an instructional error is asserted on appeal to reverse a judgment, the instructions are reviewed as a whole not in isolation. *Reed v. Hoy, supra*, at 1423. Viewing the jury instructions given in this case as a whole, it is clear that the jury was fully and correctly instructed on every essential element of respondent's First Amendment retaliation claim. First, the trial judge instructed on the law applicable to the § 1983 First Amendment retaliation claim and the purpose of the law. [Res. App. 1a-3a] Second, the trial judge instructed on the essential elements of the § 1983 claim, which concluded: "You

are required to find only that defendants deprived plaintiffs of liberty without due process of law **in one or more of the ways claimed by plaintiffs.**" [Emphasis added] [Res. App. 3a-5a] Third, the trial judge defined causation and to act knowingly, which read: "An act is done knowingly if done voluntarily and intentionally **and not because of mistake or accident or other innocent reason.**" [Emphasis added] [Res. App. 5a-6a] Fourth, the trial judge instructed on the meaning of "liberty" and "due process of law." [Res. App. 6a-8a] Fifth, the trial judge gave a standard tort compensatory damage instruction. [Res. App. 8a-11a]. Sixth, and lastly, the trial judge patiently explained the issue specific special verdict forms applicable to the First Amendment retaliation claim. [Res. App. 11a-16a].

Despite the fact the record clearly and convincingly shows the jury was properly instructed on the elements of the First Amendment retaliation claim, petitioner argues that "the jury was given no guidance concerning causation under 42 U.S.C.§ 1983." [Pet. 14] The instructions were well-suited for a mixed motive case, and they were more than adequate to guide the jury to a correct determination of the causation issue. As the instructions permitted, the jury found that petitioner acted "voluntarily and intentionally" to injure respondent and "not because of mistake or accident or other innocent reason." In other words, even if Petitioner had a mixed motive, the jury found that his motive to harm Respondent was the decisive and determinant one. See, *Mt. Healthy City School Board of Educ. v. Doyle*, 429

U.S. 274, 286, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Neither the due process of law clause of the Fifth Amendment nor the core principles of fairness which animates its construction entitled petitioner to an issue specific instruction as a matter of right. [4] As the Court explained in *Montgomery v. Virginia, supra*, at 772:

> " * * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case if there is evidence to

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4 Petitioner cites *Lassiter v. Department of Social Services*, 452 U.S. 18, 24, 33 (1981), for support for his argument that application of Rule 51 deprived him of a right to a fair trial that the trial became fundamentally unfair. [Pet. 12,13] Petitioner's reliance on *Lassiter* is both misplaced and unfortunate. He does not have a constitutional right to have an instruction submitted to the jury which addressed a specific issue or his theory of the case. He received the very process he was due. He had the opportunity to ask for an additional issue specific instruction; but, he squandered it.

> support it and **if a proper request for such an instruction is made.** * * *" [Citations omitted] [Emphasis added]

Petitioner neither submitted nor requested the trial judge to give an issue specific instruction. Petitioner had ample opportunity to do so. Petitioner was represented by experienced counsel of his choice. The trial judge went through each instruction with counsel in his chambers over a two-day period which comprised 7.25 hours. Petitioner did not object to the instructions nor to the proposed special verdict forms. Yet Petitioner here seeks to manufacture a "plain error" theory, unsupported by the record below, in order to transform the "plain error" doctrine into a rescue doctrine which it is not.

"The trial judge has substantial latitude in tailoring jury instructions; challenges are reviewed only for abuse of

discretion." *Cooper v. The Firestone Tire and Rubber Company*, 945 F.2d 1103, 1106 (9th Cir. 1991). On the record in this litigation, the trial judge did not commit "plain error" or any other instructional error. Accordingly, the Writ should be denied for there is no error to correct plain or otherwise.

II

THE PETITIONER WAIVED ALL OBJECTIONS TO THE CHALLENGED INSTRUCTIONS AND SPECIAL VERDICT NOT ONLY PURSUANT TO FRCP, RULE 51, BUT ALSO PURSUANT TO FRCP, RULE 49(a).

Rule 49(a) precludes examination on appeal the issue of causation due to petitioner's failure to object to the special verdict form. [5] Rule 49(a) provides, in part, that:

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5 The issue of causation was submitted to the jury via special verdict form which provided: "Was such conduct a legal cause in bringing about harm or injury to the plaintiff. [Res. App. 14a] The jury answered the question "yes".

> If . . . the court omits an issue of fact raised by the pleadings or by the evidence, each party waives the right to trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. [Res. App. 18a]

Petitioner contends that the causation instructions which the trial court gave were either deficient, in that, they did not adequately focus on the mixed motive issue, or that the jury was not instructed at all on the causation issue. [Pet. 14, 15] However, Petitioner did not object to the special verdict forms. Failure to object to the omission of an issue from a special verdict and jury instructions waives the right to have that issue decided. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298 (5th Cir.1993) "When, as here, an

issue of causation is omitted from the jury charge and the trial court makes no specific finding regarding cause, that court will be deemed to have found proximate causation if such a finding is supported by the evidence and is consistent with the judgment." *McDaniel v. Anheuser-Busch, Inc., supra*, at 306. [6]

Rule 49(a) gives the trial judge broad discretion to use or not use a special verdict form. The court may use such form whenever it deems it appropriate. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir.1987), quoting and citing, 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2505, at 493. Here,

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6 On Petitioner's motion for JNOV or for new trial, the trial judge expressly found that Petitioner caused Respondent to suffer a constitutional injury and found that Petitioner's conduct towards Respondent was vengeful. [Pet. App. 35a]

petitioner's trial counsel made the initial proposal for use of special verdicts and drafted the special verdict forms. [RT: 1582:14-1583:3] Rule 49(a) as well as general principles of estoppel preclude petitioner from challenging the determination of causation.

Petitioner failed to point out to this Court that he utterly failed to satisfy the requirements of FRCP Rule 49(a) and is precluded from raising this very challenge on review. As a matter of law, Petitioner is not entitled to any relief. Thus, this Petition for Writ of Certiorari is frivolous. It is brought solely for purposes of delay for which conduct sanctions should be imposed upon Petitioner and his counsel.

III

THERE IS NO NEED TO GRANT THE WRIT BECAUSE PROXIMATE OR LEGAL CAUSATION IS ALREADY A WELL ESTABLISHED, ESSENTIAL ELEMENT OF A §1983 CLAIM AND THE JURY'S CAUSATION FINDING IN THIS ACTION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Proximate Or Legal Cause Standard For §1983 Actions Is Well Established.

Petitioner's proximate causation argument is equally frivolous and meritless because causation was well established on the First Amendment claim below and is already well established in the law. For the first time on appeal to the Ninth Circuit, Petitioner argued that Respondent's § 1983 First Amendment retaliation claim was one for malicious prosecution which failed for lack of proof of the essential elements of that tort. The Ninth Circuit rejected Petitioner's mischaracterization of Respondent's First Amendment claim. The Ninth Circuit ruled that Petitioner's argument was implausible

and stated the record throughout the litigation revealed that Respondent's "claim was construed as one for retaliation." [Pet. App. 3a]

Respondent was not required to prove the elements of a common law tort action for malicious prosecution or false arrest. The elements which comprise a § 1983 constitutional tort claim are determined by federal law, not state law. Favorable termination is not an element of a 1st Amendment claim for retaliation. The action taken by Petitioner, as a state officer, [7] to retaliate against Respondent for expressing his opinion is a constitutional violation which forms the

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[7] Petitioner had extensive law enforcement training at Modesto Junior College Police Academy, had completed POST training at the Park Ranger Academy, and, as a Park Ranger, had advised campers on the rules and regulations of the park. [RT 601-02]

basis for liability under § 1983. [*Mt. Healthy, supra*, 281-86; and *Duran, supra*, at 1378]

Now, Petitioner attempts to do through the back door what he was not permitted to do through the front door. Petitioner urges this Court to grant the writ to establish that, "A Section 1983 plaintiff must show that the defendant proximately caused the constitutional injury." [Pet. App. 14] For this purpose, there is no need to grant the writ. Proximate or legal cause has long been an essential element of a § 1983 claim. *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986); and *Mt. Healthy, supra*, at 285-87.

Causation under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions."

(*Monroe, supra*, at 187) The ". . . 'basic purpose' of § 1983 damages is 'to compensate persons for injuries' that are caused by the deprivation of constitutional rights;" (*Memphis Community School Dist., supra*, at 307, citing *Carey v. Piphus*, 435 U.S. 254) [Emphasis added]. The causation standard for a First Amendment retaliation claim under § 1983 was enunciated in *Mt. Healthy, supra*, at 285-87. [8]

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8 For such a claim, the plaintiff must show by a preponderance of the evidence that his or her injuries were caused by a constitutional violation, *Mt. Healthy, supra*, at 286. To establish proximate or legal causation, the plaintiff has the burden of proof and persuasion with respect to the following: 1) engagement in protected conduct; and 2) such engagement in protected conduct was a motivating factor in the action taken against him or her, by meeting defendant's evidence, if any, that the same action would have been taken anyway for other innocent reason or reasons *Id.*, at 287.

Prior to *Monroe v. Pape, supra*, the Ninth Circuit required proof of proximate or legal causation in § 1983 actions. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959), *overruled on other grounds, Cohen v. Norris*, 300 F.2d 24 (9th Cir.1962) "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978).

Petitioner cites several cases for the position the chain of causation is broken by the action of an independent body. *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.1982), *cert. denied*, 452 U.S. 939 (1981); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988);

McLaughlin v. Alban, 775 F.2d 389 (D.C.Cir. 1985); and *Ames v. United States*, 600 F.2d 183 (8th Cir.1979) [Pet. 15] Whether or not the chain of causation is broken by the action of an independent body is initially one of fact to be decided on a case-by-case basis. In this action, both the jury and the trial judge found against Petitioner. On Petitioner's motion for JNOV or for new trial, the trial judge expressly found: "That Ranger Sereno's conduct is a concurrent cause in no way absolves him of liability for such vengeful conduct." [Pet. App. 35a] The Ninth Circuit agreed this critical finding was supported by substantial evidence. [Pet. App. 3a] The jury's finding, which embodies its resolution of credibility issues, is not to be revisited under the guise of Petitioner's invitation to this Court to make law where none is needed.

B. The Causation Finding In This Case Was Supported By Substantial Evidence.

The jury finding that Petitioner was the moving force in the chain of events which led to the criminal complaint against Respondent is supported by substantial evidence, as it is based, in part, upon Petitioner's admission. [RT 596:15-23; 597:5-10] During the trial, Petitioner was forced to admit that "we pursued the complaint through the District Attorney's office." [RT 596:15-23; 597:5-10] Deciding Petitioner's post trial motions, the trial judge agreed with the jury's finding, stating that:

> "The prosecutorial discretion of the District Attorney that most directly resulted in the issuance of the complaint in no way abrogates the causal contribution of Ranger Sereno's request for a criminal complaint as a substantial factor in the criminal prosecution of Mr. Nievera, the direct consequences of which were to cause Mr. Nievera out of pocket damage."

[Pet. App. 35a; ER 192].

The institution of the criminal complaint against Respondent was directly traceable to Ranger Sereno. *Dellums v. Powell, supra*, at 194-95. Petitioner set in motion a chain of events which led to criminal charges against Respondent. Petitioner is liable for the natural consequences of his acts. Liability under § 1983 is determined "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape, supra*, at 187. [9]

Contrary to Petitioner's argument, the chain of causation is not broken when a

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9 In the real world of law enforcement, it is unlikely an independent prosecutor in California was so eager to prosecute this case that he or she would charge Respondent without outside prompting and then dismiss the charges without obtaining a plea or a fine.

state officer provides false information to an intermediary who exercises independent judgment to pursue criminal charges. *Ames v. United States, supra*, at 185. Providing false or misleading information extends the "chain of causation." *Dellums v. Powell*, 184 U.S.App.D.C. 275, 566 F.2d 167, 192-93 (D.C.Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Where, as here, the Reporting Officer knowingly submits false information to the prosecutor the presumption of independence is overcome. *Smiddy v. Varney*, 803 F.2d 1469, 1471 (9th Cir. 1986).

Petitioner's reliance on the District Court decision in *Grove School v. Guardianship and Advocacy Com'n*, 596 F.Supp. 1361 (N.D.Ill. E.D. 1984), is misplaced. Petitioner cited language from *Grove School* which held that since the ultimate decision maker was free to disregard information supplied by

defendants the defendants were not liable for losses it incurred. [596 F.Supp., at 1369] That language was critical to *Grove School's* due process claims, and not to its First Amendment claims. *Grove School's* First Amendment claims survived the motion to dismiss. [596 F.Supp., *supra*, at 1365-66]

Respondent's § 1983 claim for retaliation was not a common law tort law claim for malicious prosecution. It was a claim brought pursuant to § 1983 for violation of his 1st Amendment rights. Section 1983 provides a right of action for "any action to punish or deter" the exercise of First Amendment rights. *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1378 (9th Cir. 1990). Respondent's § 1983 claim is derived directly from the Constitution for violation of his First Amendment rights. *Mt. Healthy, supra*, at 281-86 (1977). The right of

action provides a remedy for state action intended to punish any person "for conduct that is not merely lawful, but protected by the First Amendment." [*Duran, supra*, at 1378].

As a matter of law, Respondent's speech was entitled to First Amendment protection. He had a right to express his belief to Petitioner that he and other family members were being evicted from the campsite for racial reasons. As was stated in *Hill v. City of Houston*, 789 F.2d 1103, at 1113 (5th Cir. 1986), *aff'd, sub. nom., Hill v. City of Houston, supra*: "The first amendment was designed to shield pesky, irritating, and contentious people, even busybodies and troublemakers." The verdict in favor of Respondent gives practical expression to this fundamental principle of our free society. The verdict is supported by substantial evidence. Petitioner fails to

show the existence of special or important reasons to disturb it.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: February 17, 1994

Respectfully submitted,

HOWARD MOORE, JR.
(Counsel of Record)
PETER GRAHAM COHN
CHARLES W. KIM, JR.

Attorneys for Respondent

APPENDIX

RESPONDENT'S APPENDIX A
EXCERPTS FROM JURY INSTRUCTIONS GIVEN

JURY INSTRUCTION NO. 17

42 U.S.C. SECTION 1983

The next claim before you is based on Section 1983 of Title 42 of the United States Code which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [RT: 1596-1597]

JURY INSTRUCTION NO. 18

SECTION 1983 PURPOSE

Section 1983 creates a form of liability in favor of persons who have been deprived of rights, privileges and immunities secured to them by the United States Constitution and federal statutes. Before Section 1983 was enacted in 1871, people so injured were not able to sue state officials or persons acting under color of state law for money damages in Federal Court. In enacting the statute, Congress intended to create a remedy as broad as the protection provided by the Fourteenth Amendment to the United States Constitution and federal laws.

Section 1983 was enacted to give people a federal remedy enforceable in Federal Court because of concern that adequate protection of federal rights might

not be available in State Courts. [RT: 1597]

JURY INSTRUCTION NO. 19

ESSENTIAL ELEMENTS OF PLAINTIFFS' 1983 CLAIM

In order to prove their claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendants Sereno, Selover, and Lee knowingly and unlawfully restricted or interfered with plaintiffs' liberty interests by unlawfully evicting plaintiffs from Lake McSwain.

As to defendants Hogan, Bibby, and Paige, that said defendants knowingly participated in the wrongful restraint and interference with the liberty interests of plaintiffs by wrongfully evicting plaintiffs from Lake McSwain.

Second, that the defendants' acts and conduct deprived the plaintiffs of their federal constitutional right not to be denied or deprived of his or her liberty without due process of law.

Third, that the defendants' acts and conduct was the legal cause of plaintiffs' humiliation, embarrassment, or mental anguish.

The parties have stipulated; therefore, it is established that the defendants in this case acted under color of law of the State of California.

The plaintiffs also claim punitive damages for the 1983 violation that is alleged. Punitive damages I have already explained to you. To establish their claim, plaintiffs must show by a preponderance of the evidence that one or more of the defendants deprived one or more of the plaintiffs of their liberty without

due process of law in at least one of the ways claimed by the plaintiffs; that is, plaintiffs must establish by a preponderance of the evidence that defendants unlawfully restricted or interfered with plaintiffs' liberty interests by evicting them from Lake McSwain.

You do not have to find that defendants acted on the basis of race for the 1983 claim. You are required to find only that defendants deprived plaintiffs of liberty without due process of law in one or more of the ways claimed by plaintiffs. [RT: 1597-1599]

JURY INSTRUCTION NO. 20

LEGAL CAUSE - DEFINITION OF

I used the term "legal cause." A legal cause of injury or harm is a cause which is a substantial factor in bringing about the injury or harm. [RT: 1599]

JURY INSTRUCTION NO. 21

TO ACT "KNOWINGLY" DEFINED

I have used the term "knowingly." An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. [RT: 1599]

JURY INSTRUCTION NO. 22

"LIBERTY," "DUE PROCESS OF LAW" DEFINED

As stated before, the Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of his liberty or her liberty without due process of law.

The plaintiffs in this case, in common with the defendants and all other persons living under the protection of our Constitution, have the legal right at all times not to be deprived, without due process of law, of any liberty interest secured to him or her

or protected by the statutes or laws of the United States.

To be deprived of a liberty interest "without due process of law" means to be deprived of liberty without the authority of the law. Before the jury can determine, then, whether or not the plaintiff was deprived by the defendants of any liberty interest under the Federal Constitution "without due process of law," you must first determine, from a preponderance of the evidence in the case, whether the defendants knowingly did the acts alleged and, if so, whether, under the circumstances shown by the evidence in the case, the defendants acted within or without the bounds of their lawful authority under state law. If the defendants acted within the limits of their lawful authority under the state law, then the defendants could not have deprived the

plaintiff of any liberty "without due process of law." The court finds and instructs you that the state law applicable in this case meets the requirements of the Federal Constitution. [RT: 1599-1600]

JURY INSTRUCTION NO. 24

§ 1983 DAMAGES

I'm now going to refer to damages, and just because I instruct you on how damages are awarded and how to calculate them does not mean that I have an opinion on whether or not the defendants should be held liable or whether you should award damages.

If you return a verdict for the plaintiffs, then you must consider the issue of actual damages. If you return a verdict for the plaintiffs, then you must award them such sum of money as you believe will fairly and justly compensate them for any injury you believe they actually sustained as a direct consequence of the

conduct of the defendants. You shall award actual damages only for those injuries which you find that plaintiffs have proven by a preponderance of the evidence. Moreover, you shall award actual damages only for those injuries which you find plaintiffs have proven by a preponderance of the evidence to have been a direct result of conduct by the defendants in violation of Section 1983.

You may not simply award damages for any injury suffered by plaintiffs. You must award actual damages only for those injuries that are a direct result of actions by these defendants and that are direct result of conduct by defendants which violated plaintiffs' federal rights under color of law.

Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial,

and only on that evidence.

[RT: 1603-1604]

JURY INSTRUCTION NO. 37

COMPENSATORY DAMAGES

If, under the instructions I have given you, you find that plaintiffs are entitled to a verdict against any of the defendants, you must then award plaintiffs damages, economic and non-economic, depending on the particular claim, in an amount that will reasonably compensate them for each of the following elements of claimed harm or loss, providing that you find that such harm or loss was suffered by him or her and legally caused by the act or omission upon which you base your finding of liability.

The term "economic damages" means objectively verifiable monetary losses, including the cost of legal representation for defending against a criminal complaint,

and the loss of earnings. The term "non-economic" damages means subjective, nonmonetary losses, including, but not limited to, dishonor, disgrace, embarrassment, inconvenience, mental suffering, emotional distress and humiliation. [RT: 1610-1611]

TRIAL COURT'S INSTRUCTIONS RE: SPECIAL VERDICT FOR JAIME NIEVERA'S FIRST AMENDMENT CLAIM

I'm going to show you now the verdicts forms and go through them briefly with you before I let you go for the evening. ... The way the verdict forms have been structured is to go through the claims. ... [RT: 1728]

As to one plaintiff you will have three more questions to answer. You won't have these questions on all the other verdict forms, and that you will see it

when you look at the verdict form. It will be self-explanatory.

As to Mr. Jaime Nievera, you have the question of whether there was a wrongful retaliation for his verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction by the filing of a criminal incident report or the seeking of the criminal charges against Mr. Nievera. That is only as to two of the defendants whose names are here, Vincent Sereno and Roger Hogan. Your finding is yes or no. And, again, whether that was a cause of harm to Mr. Nievera, if you should find that the conduct occurred, yes or no, and then whether or not there are damages, and then two more questions as to whether or not you find that the conduct was sufficient to warrant punitive and exemplary damages, and

finally the amount of any exemplary damages.

We also have included instructions that tell you as you are answering to go to the next question, and so I'm confident that these are self-explanatory.

[RT: 1731-1732]

EXCERPT OF SPECIAL VERDICT RE: PLAINTIFF JAIME NIEVERA[10]

1st Amendment U.S. Constitutional Claim

Question No. 18: Did any defendant wrongfully retaliate against Jaime Nievera for verbally protesting the alleged interference with plaintiffs' liberty interests and/or their eviction from Lake McSwain by filing a criminal incident report or seeking criminal charges against Mr. Nievera?

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10 ER 134-136.

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	___
	Defendant Roger Hogan	___	X

If you answered Question No. 18 "yes" as to any defendant, answer Question No. 19 as to that defendant.

Question No. 19: Was such conduct a legal cause in bringing about harm or injury to the plaintiff?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	X	___
	Defendant Roger Hogan	___	X

If you answered Questions No. 18 and 19 "yes" as to any defendant, answer Questions No. 20 through 22.

Question No. 20: What is the amount of damages, if any, suffered by the plaintiff as a result of this violation?

Answer: $ 4,500

Question No. 21: Did any such individual defendant act with an evil motive or a callous disregard or indifference to the plaintiff's rights?

Answer "yes" or "no" after the name of each defendant.

		Yes	No
Answer:	Defendant Vincent Sereno	___	X
	Defendant Roger Hogan	___	X

Question No. 22: What amount of damages, if any, is the plaintiff entitled to against each such defendant for the sake of example and by way of punishment?

Insert an amount after the name of each such individual defendant.

Answer: Defendant Vincent Sereno $ none

Defendant Roger Hogan $ none

Dated: November 7, 1991

/s/
Foreperson

RESPONDENT'S APPENDIX B
EXCERPTS FROM
U.S. CONSTITUTION AND FRCP

FIRST AMENDMENT TO THE U.S. CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FED.R.CIV.P.49(a)

SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use

such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.